

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SOUTHWEST VOTER REGISTRATION
EDUCATION PROJECT; SOUTHERN
CHRISTIAN LEADERSHIP CONFERENCE OF
GREATER LOS ANGELES; and NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, CALIFORNIA STATE
CONFERENCE OF BRANCHES,**

Case No: 03-56498

Plaintiffs-Appellants,

v.

**KEVIN SHELLEY, in his official capacity as
Secretary of State,**

Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California, Western Division
No. EDCV 03-5717 SVW (RZx)
The Honorable Judge Stephen V. Wilson

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INTRODUCTION

Punch-card voting systems are old technology more prone to voter error than are newer voting systems. Both the present and the prior Secretary of State have been acutely aware of this reality, and have taken aggressive steps to eliminate the use of punch-card machines statewide. Indeed, as appellants

acknowledge, the parties resolved a prior lawsuit by agreeing that punch-card systems would be eliminated by the time of the March 2004 primary election.

Appellants obviously are pleased with the part of the agreement eliminating the use of punch-cards voting system, but have apparently become dissatisfied with the part of the agreement specifying the timeframe for eliminating them, so much so that they are seeking to enjoin an election scheduled to take place prior to the agreed-to date set for decertification of the punch-card systems. The District Court was correct in refusing to enjoin the October recall election, however, having concluded that, based on the doctrines of res judicata and laches, appellants were unlikely to prevail on the merits of their claim.

BASIS OF DISTRICT COURT'S JURISDICTION

Appellants challenge the intended use of punch-card voting machines in six California counties at the recall election scheduled for October 7, 2003. The United States District Court for the Central District of California had subject matter jurisdiction over this action under 28 U.S.C. § 1331, based on appellants' claims arising under the Equal Protection Clause and section 2 of the Voting Rights Act.

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BASIS OF APPELLATE COURT JURISDICTION

Appellants appeal from an order entered August 20, 2003, denying their motion for a preliminary injunction. They filed their Notice of Appeal on August 26, 2003, which was timely under Rule 4(a) of the Federal Rules of Appellate Procedure. This Court has jurisdiction over the action under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion by concluding that appellants are unlikely to prevail on the merits of their claims.
2. Whether the District Court abused its discretion by concluding that the public interest and balance of hardships weigh in favor of allowing the election to proceed.

STATEMENT OF FACTS

On April 17, 2001, in *Common Cause, et al. v. Bill Jones*, No. 01-03470 SVW (*Common Cause*), a number of individuals and entities, including the Southwest Voter Registration Education Project (SVREP) and the Southern Christian Leadership Conference of Greater Los Angeles (SCLC), filed suit for declaratory and injunctive relief, alleging violations of the right to vote based on the use of prescored punch-card voting systems in nine California counties.

Supplemental Excerpt of Record (SER-SOS) 2. In that case, plaintiffs alleged that "three groups of citizens -- African-Americans, Asian-Americans, and Latinos -- are disproportionately denied the right to have their votes counted because they are more likely to reside in the counties that use PPC [punch-card] machines." Appellants' Excerpt of Record (ER) 3, p. 29. Plaintiffs sought an injunction requiring the California Secretary of State to decertify the punch-card machines (Pollstar and VotoMatic machines) by the time of the March 2002 Primary Election. SER-SOS 2, p. 40.

On February 19, 2002, the Honorable Stephen V. Wilson signed an order requiring the parties to lodge a form of consent decree within seven days. ER 3, p. 11.

On May 6, 2002, the parties executed a Consent Decree that was signed by Judge Wilson on May 8. Judgment was filed on May 9, 2002. SER-SOS 3, p. 41. The consent decree provided that the punch-card machines would be decertified effective March 1, 2004. SER-SOS 3, p. 43.

Since that time, and as contemplated by the consent decree, primary and general elections were held in 2002, and various local elections have been held in the six counties that use the punch-card machines. In addition, a well-publicized

recall election took place in the City of South Gate in January 2003, without objection regarding the use of the punch-card machines.

On July 23, 2003, Secretary of State Kevin Shelley certified the sufficiency of the signatures collected on a petition to recall Governor Gray Davis. The following day, Cruz Bustamante, the Lieutenant Governor,^{1/} set the election for Tuesday, October 7, 2003.^{2/}

STATEMENT OF THE CASE

On August 7, 2003, plaintiffs SVREP and SCLC filed the instant action seeking to postpone the election until after the effective date of the decertification of the punch-card voting machines. On or about August 10, appellants filed a First Amended Complaint, adding the National Association for the Advancement of Colored People (NAACP) as a plaintiff. SER-SOS 1.

On August 12, 2003, five days after filing the underlying action, appellants filed their ex parte application for a temporary restraining order pending a hearing on a preliminary injunction. The District Court consolidated

¹ Pursuant to law, when a recall of the Governor is initiated, the recall duties of that office are to be performed by the Lieutenant Governor. (Cal.Const., art. II, § 17.) Moreover, the election must be held "not less than 60 days nor more than 80 days from the date of certification of sufficient signatures." (Cal.Const., art. II, § 15, subd. (a).)

² According to statute, "[n]o election shall be held on any day other than a Tuesday, nor shall any election be held on the day before, the day of, or the day after, a state holiday." (Cal. Elec. Code § 1100.)

appellants' ex parte application for temporary restraining order with their motion for preliminary injunction and, following briefing by the Secretary of State and intervenor Ted Costa,^{3/} heard oral argument on August 18, 2003.

On August 20, 2003, the District Court entered its Order Denying Plaintiffs' Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction. ER 7. Appellants filed their Notice of Appeal on August 26, 2003.

STANDARD OF REVIEW

In this circuit, "a district court's order regarding injunctive relief is subject to limited review." *El Pollo Loco v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003). Accordingly, the denial of a preliminary injunction will only be reversed where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964 (9th Cir. 2002).

Moreover, a reviewing court may not reverse a district court's order simply because it would have reached a different result. "'The [reviewing] court is not empowered to substitute its judgment for that of the [district court.]'" *Sardi's Restaurant Corporation v. Sardie*, 755 F.2d 719, 723 (9th Cir. 1985.)

3. Costa filed a brief as amicus curiae, but was later given leave to intervene.

SUMMARY OF ARGUMENTS

An election to consider whether to recall Governor Gray Davis is scheduled to take place on October 7, 2003. Appellants are seeking to enjoin the election until such time as the punch-card voting systems that are used in six counties have been replaced with more modern equipment. However, these same appellants and the Secretary of State entered into a consent decree that was later reduced to a judgment in May 2002 and by which they agreed that the punch-card systems would be decertified as of March 1, 2004. Appellants, however, are bound by the doctrines of res judicata and laches, and, on that basis, the District Court properly recognized the likelihood of success on the merits is remote. Moreover, the Secretary of State and counties are engaging in outreach and educational efforts about the proper use of punch-card and other voting systems, aimed at minimizing the likelihood that voter error will occur. This effort, rather than an injunction undermining the constitutionally-mandated October 7, 2003 election, is the proper means of addressing the problems appellants have identified. This Court should affirm the District Court's order denying the preliminary injunction.

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ARGUMENT

I.

THE DISTRICT COURT EMPLOYED THE APPROPRIATE LEGAL STANDARDS IN DENYING INJUNCTIVE RELIEF

The District Court correctly identified the standard for issuance of a preliminary injunction:

A party moving for preliminary injunctive relief bears the burden of proving either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *Sammartano v. First Judicial District Court*, 303 F.3d. 959, 965 (9th Cir. 2002). (Other citations omitted.)

When the public interest is affected by the proposed injunction it is also factored into the analysis. While the effect on the public interest was, at one time, part of the "balance of hardships" analysis, the Ninth Circuit has held that this factor "is better seen as an element that deserves separate attention in cases where the public interest may be affected." *Sammartano, supra*, 303 F.3d at 1400.

ER 7, pp. 202-203.

In applying this established standard, the District Court addressed each element of the test for injunctive relief and correctly found that appellants failed to carry their burden under either test. Appellants do not and cannot contest the standard applied by the Court.

II.

THE DISTRICT COURT CORRECTLY APPREHENDED THE LAW WITH RESPECT TO THE UNDERLYING ISSUES IN THE CASE

A. The District Court Correctly Found That Appellants Are Not Likely To Succeed On The Merits Because Their Claims Are Barred By The Doctrine Of Res Judicata

Appellants totally misunderstood the significance of the Secretary of State's reliance on the doctrine of res judicata in opposing their application for a temporary restraining order and preliminary injunction. Based on this misunderstanding, appellants begin their argument with the incorrect assertion that res judicata was not a basis for the District Court's denial of injunctive relief. AOB 27. To the contrary, the District Court properly began its analysis with a discussion of that threshold issue.

As the District Court correctly noted, "[T]o determine the likelihood that plaintiffs will prevail on the merits of their lawsuit, it is first necessary to consider the viability of any defenses to its prosecution." ER 7, p. 203. In other words, if there is a meritorious defense to a complaint, the likelihood that plaintiffs will succeed on the merits of that complaint is eliminated. After setting forth the elements of a res judicata defense and analyzing each in turn, the Court concluded by noting that, "while the Court need not *decide* the res judicata issue at this

juncture, there is ample reason to believe that Plaintiffs will have a difficult time overcoming it." ER 7, p. 208. (Emphasis added.) That is, in denying appellants' motion for preliminary injunctive relief, the District Court properly concluded that - given the strength of the res judicata defense - the likelihood of success on the merits of their lawsuit is remote.

Appellants concur with the District Court's identification of the elements of the res judicata defense. AOB 27. As the District Court stated, "[A] subsequent action may be barred under the doctrine of res judicata where (1) it involves the same 'claim' as an earlier suit, (2) the earlier suit has reached a final judgment on the merits, and (3) the earlier suit involves the same parties or their privies," ER 7, pp. 203-204, citing *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993). Appellants do not dispute the District Court's findings that their prior action reached a final judgment on the merits and that it involved these same parties or their privies.^{4/} They argue only that the District Court erred in finding that the prior action involved the same claims at issue here. AOB 28. Appellants' argument, however, ignores the governing principles this Court has articulated for determining whether claims in two actions are the same for the purpose of res judicata.

4. ER 7, pp. 206-208.

As the District Court correctly noted, that determination depends upon:

- 1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- 2) whether substantially the same evidence is presented in the two actions;
- 3) whether the two suits involve infringement of the same right; and
- 4) whether the two suits arise out of the same transactional nucleus of facts.

ER 7, p. 204 (citing *Nordhorn, supra*, 9 F.3d at 1405).

The District Court properly concluded that here "[a]ll of these conditions are satisfied."

First, the District Court correctly found that "the facts and constitutional deprivations alleged by Plaintiffs are nearly identical to, and at some points verbatim recitations of, those asserted in the *Common Cause* case." ER 7, p. 204. The District Court noted that appellants announced explicitly in the very first paragraph of their complaint that this suit "challenges 'the same punch card voting machines challenged before this Court in *Common Cause, et al. v. Jones* ... which resulted in a consent decree decertifying these machines effective March 1, 2004'" ER 7, p. 204. Indeed, appellants conceded in their ex parte application for

temporary restraining order below that their prior case "*raised precisely the same legal claims as are at issue in this case.*" SER-SOS 4, p. 71. (Emphasis supplied.) A comparison of appellants' allegations in the two actions conclusively confirms that the transactional nucleus of facts common to both actions is appellants' allegations about the residual vote rates experienced with use of the punch-card voting systems, and the fact that they do not want those voting machines used in California elections.^{5/} The District Court properly concluded that the two actions contemplate substantially the same evidence, involve alleged infringement of the same rights, and arise out of the same transactional nucleus of facts. ER 7, pp.204-206.

Likewise, the District Court properly found the remaining condition satisfied in that "the rights established by *Common Cause* would certainly be impaired by permitting this suit to proceed." ER 7, p. 205. As the Court explained, "[i]mplicit in the Consent Decree and Judgment is an intervening

5. Exhibit 1 of the Supplemental Excerpt of Record submitted by the Secretary of State (SER-SOS) is a copy of the First Amended Complaint in *Common Cause, et al. v. Bill Jones*, CV 01-03470-SVW, submitted by appellants as Exhibit 1 in support of their Application for a Temporary Restraining Order. CT 14. An examination of both complaints reveals that the charging allegations contained in paragraphs 23-32 of the *Common Cause* FAC are identical to paragraphs 14-23 of the FAC in the instant suit. In addition, paragraphs 35-41 of the *Common Cause* complaint are virtually identical to paragraphs 37-40 and 24-25 of the complaint in the instant matter.

period during which punch-card machines would remain certified for use. The state's right to use such machines until March 2004, and the state's interest in an orderly replacement of punch-card balloting, would both be eviscerated if this suit proceeded to a contrary end."⁶ ER 7, p. 205. The District Court properly recognized that appellants "are seeking to establish the same constitutional violations alleged in *Common Cause*, but to secure an additional remedy." ER 7, p. 206. Collectively, the satisfaction of the four conditions identified by this Court in *Nordhorn* confirms the identity between the claims in this action and the prior lawsuit and thus confirms that the application of res judicata is correct.

Rather than address the *Nordhorn* directions given by this Court, however, appellants seek to avoid the District Court's res judicata finding by attempting to recast their present claim in a transparent effort to distinguish it from the prior action. According to appellants, the prior litigation was aimed at the replacement of defective voting machinery at the earliest feasible date, while the present action seeks to prevent their use in a specific instance, to wit, the "unscheduled, unforeseeable, and unprecedented" recall election scheduled to take

6. Exhibit 2 of the SER-SOS reveals that the Consent Decree in *Common Cause* was reduced to a judgment. "A consent decree is a judgment, has the force of res judicata..." *Taylor v. United States*, 181 F.3d 1017, 1030, n.8 (9th Cir. 1999). This document was submitted to the court below as Exhibit 5 in support of appellants' Application for a Temporary Restraining Order.

place October 7, 2003. AOB 28. This is a distinction without a difference because the October 7, 2003, election, as is true of all other elections scheduled prior to March 1, 2004, is subsumed within the substance of the consent decree.

Appellants, however, deny that their present claims are based solely on the fact that an unanticipated recall election has been called. *Ibid.* Rather, they seek to bolster the allegation that the claims are different by citing a series of irrelevant factors which they allege could not have been anticipated, as evidence that the claims are somehow different. AOB 28-29. None of these factors has any bearing on whether or not the claims alleged in *Common Cause* are the same as those alleged herein.

For example, appellants speculate that the presence of a large number of candidates for the gubernatorial race may lead to mass confusion because each voter will only be casting a vote for one candidate. To the extent that the number of candidates may cause confusion, however, the outreach and education efforts being undertaken by the Secretary of State and the county elections officials to instruct voters not to vote for more than one candidate are aimed at mitigating this problem.

Appellants claim that a "resource-driven consolidation of polling places ... will disproportionately affect users of antiquated, time-consuming punch-card

machinery," but they offer no evidentiary support for this conjecture.^{7/} AOB 29. Finally, appellants note that there are initiatives on the ballot, but again are unable to provide viable argument about how this will unduly affect voters in counties using punch-card systems.

In the end, none of appellants' assertions can change an indisputable conclusion of the District Court: because the recall provisions of the California Constitution have been in effect for ninety-two years, appellants cannot show that the recall election was unknowable at the time they entered into the consent decree. The fact is that every election is different and no one can foresee with certainty all of the eventualities that may occur. That appellants - at the time they in good faith executed the consent decree - could not predict the precise details of the recall election, or what measures might appear on such a recall ballot, does not excuse them from the terms of that decree. Appellants bargained for, and

7. Moreover, the charge that use of the punch-card machines will be time-consuming ignores the fact that there will be at most four issues to be voted upon. It is already apparent that, as a result of a decision of Judge Barry Ted Moskowitz, of the Southern District, in *Partnoy v. Shelley*, 03-cv-1460 BTM, some voters will not vote on the recall portion of the ballot, but will vote on a possible successor should Governor Davis be recalled. Others, such as Senator Diane Feinstein, have already announced their intention to vote on the recall issue, but not the successor issue. All of these voters will cast a maximum of three votes. Because of the small number of issues on the ballot, it should be a relatively simple matter for a voter to check and make sure that the ballot reflects the same number of holes as votes cast before turning it in to the poll sitter.

received, certainty: they entered into a Consent Decree by which they knew for certain, as did the Secretary of State, that the punch-card voting machines would be decertified as of March 1, 2004, and that, until then, these systems would continue to be used. They cannot now walk away from the deal they made.

Indeed, the complaint in *Common Cause* prayed for an order enjoining the use of punch-card voting machinery and requiring the Secretary of State to "ensure that pre-scored punch card machines are replaced with more reliable equipment by the time of the March 2002 election." SER - SOS 2, p. 40. At the time Judge Wilson signed the Judgment incorporating the Consent Decree by which the parties agreed to replacement of the punch-card machines by March 1, 2004, therefore, appellants were well aware of the fact that those machines would be used in statewide elections occurring before March 2004, including the General Election of 2002.

They were also aware that, prior to March 1, 2004, there would likely be a number of local elections in the counties that use the punch-card systems. Plaintiffs chose not to protest the use of those punch-card systems for those local elections, nor did they protest when the machines were used for the recall of three city council members and the city treasurer in the City of South Gate, a

predominantly Latino community in Los Angeles County, in early 2003.^{8/} Moreover, they have not expressed any opposition to their use in the countywide elections scheduled to take place in several counties, including Los Angeles, on November 4, 2003.

The District Court's finding that appellants' claims in *Common Cause* and in the instant case are the same was correct. Thus, the District Court correctly concluded that appellants are not likely to prevail on the merits because of the application of res judicata. This conclusion is correct and is not subject to reversal for an abuse of discretion.

B. The District Court Correctly Found That Appellants' Claims Are Also Likely Barred By Laches

As with the Court's res judicata finding, appellants err in failing accurately to comprehend the significance of the District Court's conclusion that appellants are unlikely to prevail on the merits of their claims because their action

8. Given the fact that the City of South Gate in Los Angeles County held a widely-publicized recall election of three of the City's council members and its treasurer in January 2003, appellants can hardly have been unaware that such elections can be called at any time. Appellants' explanation for not objecting to the punch-card machines in that recall election is not credible. The stated reason for their failure to object was that "there was not even a reasonable possibility that the results of the South Gate recall election would have been within the margin of error attributable to punch-card voting machines because voters supported recall of each of the four officials by a margin of about 8-1," citing a newspaper article published the day after the election. CT 24, p. 8. There was, of course, no way to know that result until after the election.

is barred by laches. Appellants again emphasize that the District Court "expressly declined to decide the question." AOB 32. As with its conclusion on the res judicata issue, however, the District Court's finding was that, "while the Court need not decide the defense of laches at this point in the litigation, it clearly poses a significant impediment to the prosecution of this suit." ER 7, p. 209. That is, because it was not faced with a dispositive motion, the District Court did not *decide* whether appellants' claims are likely barred by laches as part of its preliminary injunction denial. Rather, the Court appropriately determined, in light of the strength of this defense, that appellants were not likely to prevail on their claims at trial.

Again, appellants do not contest the District Court's proper identification of the elements of the substantive bar to appellants' claims. As the District Court stated, "Under the equitable doctrine of laches, the Court may deny an injunction to a plaintiff who fails diligently to assert his claim. 'Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" ER 7, p. 208 (quoting *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534 (1961)). (*Ibid.*)

The District Court properly found that "Plaintiffs waited almost two years to reassert their claims with full knowledge that, until replacement of the punch-

card machines in March of 2004, other elections would take place. On the eve of this election, Plaintiffs have suddenly rediscovered 'the malfunctioning machine of our democracy' that will render this election a 'sham.' (Memo. in Supp. of Ex Parte Application at 1.)" ER 7, 208. The District Court noted "that whatever Plaintiffs' reasons for not challenging the 2002 election, it is still the case that the *Common Cause* plaintiffs proposed 2004 – not 2003 – as the year for punch-card phase-out, with full actual or constructive knowledge that special elections were a possibility." ER 7, p. 209.

Appellants improperly accuse the District Court of distorting the facts in this regard and argue that they "reasonably believed, as did everyone else in California, that there would be no statewide election between November 2002 and March 2004."^{9/} AOB 32.

As previously explained, however, appellants have been aware at all times of the provisions of the California Constitution and the California Elections Code

9. This, of course, does not explain why appellants, given their concern about the reliability of the punch-card machines, did not challenge their use in California immediately following the Presidential Election of 2000. They waited until April 2001 to file the *Common Cause* action, agreed to March 2004 for the decertification of the machines and had the agreement reduced to a judgment without ever having to test their theories by submitting them to a trial on the merits. Now, they seek to retain the benefits of that agreement for themselves but to deprive the State of the provisions of that same agreement through the imposition of the preliminary injunction they seek.

governing elections in California. In *Common Cause*, appellants sued the Secretary of State based on Equal Protection and the Voting Rights Act to eliminate punch-card voting machines from use in California elections, initially as early as the March 2002 elections, and ultimately consenting to their elimination by the March 2004 elections. If appellants had wanted to prevent punch-card use in *any* election held earlier than March 2004, then they had an obligation to seek and obtain resolution of that aspect of their claim.

As noted by the Court, however, appellants have *never* sought a resolution of the merits of their claims. ER 7, p. 223. Instead, they obtained the March 2004 effective date of decertification they sought – a date relied upon by the affected counties’ elections staff in working and making their planning decisions. Accordingly, appellants should not now be heard to claim that an election scheduled in accordance with the California Constitution, should be enjoined until after the March 2004 decertification date or some other date not agreed to in the Consent Decree. As the District Court correctly noted, this case is identical to *Common Cause*, except that appellants now seek an additional remedy, postponement of a particular election, that would eviscerate the Consent Decree.

Appellants do not contest the District Court's finding of prejudice to the voters of the State of California should the October 7 election be enjoined. The counties relied on the date imposed by the Consent Decree and, as noted by the District Court, perhaps could have attempted to update the equipment earlier if it had been alerted to the fact that appellants' challenge was of a continuing nature. ER 7, p. 209. The District Court correctly concluded that prejudice to the counties would result if appellants were allowed to proceed despite their delay in making their present request because enjoining the election "would bear strongly upon the State's interest in complying with its laws and effecting the will of its people." ER 7, p. 209.

These findings are unassailable. The District Court's finding that laches "clearly poses a significant impediment to the prosecution of this suit" is correct and leads to the further conclusion that appellants are not likely to succeed on the merits of the claims raised in this case due to the laches bar. This conclusion is not subject to question, let alone to reversal for an abuse of discretion.

C. In Considering The Public Interest And Balance Of Hardships, The District Court Correctly Concluded That Preliminary Injunctive Relief Was Not Warranted

The Secretary of State acknowledges that punch-card voting machines are "prone to user error," and that the short timeframe of this election poses special

challenges to county election officials. ER 2, p. 3. Accordingly, faced with this reality, the Secretary of State is taking extraordinary steps aimed at ensuring that all voters are able to cast their votes effectively on all of the voting systems that will be used and, in particular, to ensure that punch-card voters are able to cast their votes effectively.

For example, the Secretary of State's Office is in the process of producing the following, at a minimum, to assist voters in using the various voting machines: (1) Public Service Announcements for the electronic media; (2) articles for printed media, especially for community newspapers and other publications; (3) items for radio and television; (4) State Ballot Pamphlets distributed to all voter households that include instructions on how to contact local elections officials for information regarding the methods of voting; (5) op-ed articles regarding the voting process, to be placed and distributed by the Secretary of State's Office and local elections officials. All these materials will be produced or prepared in multiple languages and distributed to minority language media and community-based organizations. In addition, the Secretary of State's website provides specific information on how to use voting systems in each of California's 58 counties, including those counties that will be using punch-card voting systems. SER-SOS 5, pp. 73-76.

Engaging in these efforts, rather than issuing preliminary injunctive relief to postpone the constitutionally-mandated election, is the appropriate way to address the concerns raised by appellants.^{10/} Indeed, settled principles of judicial restraint support this conclusion.

"Because the conduct of elections is so essential to a state's political self-determination, the strong public interest in having elections go forward generally weighs heavily against an injunction that would postpone an upcoming election." *Cano v. Davis*, 191 F. Supp. 1135, 1139 (C.D. Cal. 2001) (citations omitted). As the District Court properly observed, this is true even in situations – unlike the present circumstances – where the challenges in question are potentially or even actually meritorious. ER 7, p. 222. Accordingly, the District Court properly found that "the public interest in going forward with the scheduled election, including the gubernatorial recall and ballot initiatives, strongly favors denial of the preliminary injunction." ER 7, p.225.

Moreover, with regard to the public harm that would be caused by enjoining the upcoming election, appellants are hardly seeking a "brief

10. That instruction in the proper use of the punch-card machines is certainly part of the solution to appellants' concerns is borne out by their repeated statement that even *within* those counties that use punch-card voting machines, minorities have a much higher residual vote rate than non-minorities. AOB 4, 17, 42, 45.

postponement." With the election called on July 24, 2003, to take place on October 7, 2003, a postponement of five months to March 2004 would triple the time designated in the California Constitution for holding the election.^{11/} The District Court properly observed that,

Even if the election could somehow be conducted at a later date, it is relevant in the public interest analysis to consider whether such a delayed election would not itself work strongly against the voting rights of all Californians. Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution. Arguably, then, the Court by granting the relief sought could engender a far greater abridgement of the right to vote than it would by denying that relief.

ER 7, p. 224.^{12/}

The District Court correctly concluded that the public interest in going forward with the scheduled election strongly favors denial of the preliminary injunction. This conclusion is not subject to question, let alone reversal for an abuse of discretion.

11. Article II, section 15, subdivision (b), of the California Constitution provides that a recall election of a state official shall be held "not less than 60 days nor more than 80 days from the date of certification of sufficient signatures."

12. The District Court also found that "[i]mplicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office." ER 7, p. 224.

CONCLUSION

This is an appeal from the denial of a preliminary injunction seeking to postpone the first election to recall a governor in the history of the State of California. In a well-organized and exhaustive discussion of the issues, the District Court accurately identified the legal standard governing issuance of a preliminary injunction and correctly apprehended the law with respect to the underlying issues in the case. Appellants have failed utterly to demonstrate that the District Court abused its discretion in any manner in denying the relief sought.

The principal obstacle to appellants' request for injunctive relief, of course, is the existence of the consent decree entered into between appellants and the Secretary of State in prior litigation by which the parties agreed to decertification of the punch-card voting machines by March 2004. That decree was reduced to a judgment and now has a res judicata effect on the present litigation with the result that appellants cannot show a probability of success on the merits of their claims.

The first test utilized by this Circuit for determining whether injunctive relief is appropriate is whether the requesting party can show a combination of likelihood of success on the merits and a possibility of irreparable harm. The District Court correctly concluded that appellants fail the first prong of this test.

The second test used in this Circuit is whether the requesting party can demonstrate that serious questions are raised and the balance of hardships tips sharply in his favor. The District Court correctly concluded that appellants fail the first prong of this test and that, even if there were a serious question on the merits, they also fail the second prong of this test.

Notwithstanding the consent decree and appellants' failure to meet the standard for issuance of a preliminary injunction, the Secretary of State has made a commitment to carry out an extensive education program on the use of all of the types of voting machines used in California, and especially in the punch-card counties, with the intent to minimize to the extent possible voter errors that could lead to residual vote counts. Given the existence of the education effort, there should be a reduced risk that voters will misuse the equipment in the upcoming election. However, there is a 100 percent probability that the peoples' right of recall, set forth in the California Constitution 92 years ago, would be totally thwarted if the election were to be postponed.

The District Court's Order was correct and was not in any manner the result of an abuse of discretion. This Court should affirm that Order in its entirety.

Dated: September 4, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the attached Appellee's Brief is proportionately spaced, uses Times New Roman 14-point typeface, and contains 5829 words.

Dated: September 4, 2003

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees state they do not know of any related cases pending in this Court at this time.

Dated: September 4, 2003

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Susan R. Oie".

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DECLARATION OF SERVICE

Case Name : *Southwest Voter Registration Education Project, et al v. Shelley,*
Case No. :
Court : 9th Circuit Court of Appeal

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled case; my business address is 1300 I Street, Sacramento, California.

On September 4, 2003, I served the following:

APPELLEE'S BRIEF

Addressed as follows:

See attached "Service List"

☒ **ELECTRONIC MAIL TRANSMISSION:**

Pursuant to Federal Rules of Civil Procedure Rule 5(b)(2)(D) and by stipulation of the parties, on the date below I served via electronic mail the documents referenced above to the following email addresses originating from the Office of the Attorney General's electronic mail address judith.rice@doj.ca.gov :

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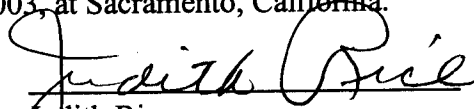
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On the date below, I served the attached **APPELLEE'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at Sacramento, California, addressed as follows:

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